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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DARRIN DALE OWENS,

Defendant and Appellant.

C041228

(Sup. Ct. No. 01F5314)

Defendant Darrin Dale Owens entered a negotiated plea of no contest to maliciously and willfully discharging a firearm at an occupied motor vehicle. (Pen. Code, § 246.)<sup>1</sup> The trial court sentenced him to state prison for the five-year middle term.

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<sup>1</sup> Further undesignated section references are to the Penal Code.

On appeal, defendant claims the trial court relied on erroneous sentencing factors and improperly failed to consider a relevant factor. We disagree and shall affirm the judgment.

#### FACTS<sup>2</sup>

Defendant and Julie Cox had been sleeping at defendant's house before Julie's estranged husband, Samuel Cox, Jr. (Samuel), entered their room with a shotgun. Samuel was wearing a mask, but Julie recognized his voice. He said something to the effect of, "What are you guys doing?" Defendant got out of bed and indicated they were not doing anything. Samuel shot defendant, wounding him in the leg. He also hit defendant on the back of the head with the butt of his gun, and he hit Julie in the leg. He then left.

Defendant and Julie were concerned that Samuel might be waiting outside and that he would return. Defendant called his brother and asked him to come over to assist.<sup>3</sup> His brother later told police that defendant called at approximately 4:30 a.m., but other evidence suggests it might have been later. Defendant's brother drove toward defendant's house with a loaded shotgun, but he took a wrong turn and was stopped by police.

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<sup>2</sup> The factual summary is taken from the probation report and the evidence adduced at sentencing.

<sup>3</sup> Defendant later reported that he did not call 911 or the police because Julie was concerned that Child Protective Services would take her son, who had been present at the house. But Julie reported that she did not want to call 911 because she thought Samuel was still around or just outside.

In the meantime, defendant retrieved a semiautomatic rifle and loaded it. He initially waited by the front door but later positioned himself between two trucks in the driveway.

Defendant saw a car traveling in a suspicious manner. Defendant's subsequent statements indicate that the car initially passed near his location, but that it turned and proceeded back in his direction. Defendant thought it was Samuel and fired multiple shots at the car. The car was actually driven by Jerry Tessarzik, who was delivering newspapers. Tessarzik heard what initially sounded to him like firecrackers. After the first "bang," the passenger side window shattered, followed by the rear window. Tessarzik sped away to a nearby residence and had someone contact police.

Police were dispatched at approximately 5:13 a.m. Based on the area of entry and exit into the car of one of the bullets, investigators determined that it would have passed through the area normally occupied by the driver's head and neck. Fortunately, Tessarzik was apparently leaning out the window when the shot was fired. He sustained minor injuries to his right shoulder from flying glass and an injury to his right upper arm that was consistent with being grazed by a bullet. In addition to the damage to the windshields, the right rear tire had been shot and was flat. Four expended rifle casings were found in defendant's driveway.

Defendant said that after the shooting, he went inside and reloaded his gun, and then went back outside. Julie Cox and defendant then drove to defendant's brother's residence, where

they hid the gun, and then drove to the hospital. When he spoke to police, defendant (at least initially) said he shot low and the rounds did not strike the car.

#### DISCUSSION

Defendant challenges three of the factors he claims the trial court used to support its decision to deny probation: (1) the victim was particularly vulnerable; (2) the crime involved planning; and (3) the plea bargain was merciful. Defendant further challenges the first two of these factors as aggravating factors the court weighed in imposing the middle term,<sup>4</sup> and he challenges one additional factor: the crime involved great violence or bodily harm, the threat thereof, or other acts disclosing a high degree of cruelty, viciousness, or callousness. Finally, defendant claims the court erred by failing to consider that he might be in danger if sentenced to prison.

We shall discuss each of the relevant factors in turn. We must uphold the trial court's sentencing determinations that are supported by substantial evidence. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 917.) We also consider whether defendant preserved these issues for appeal by raising them in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.)

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<sup>4</sup> Although not required to do so, the trial court stated its reasons for imposing the middle term. (See *People v. Lamb* (1988) 206 Cal.App.3d 397, 401-402; § 1170, subd. (b).)

A. Victim Vulnerability

First, defendant challenges the trial court's finding that the victim was particularly vulnerable. The probation report included vulnerability both as a criteria affecting probation and as an aggravating factor. (See Cal. Rules of Court, rules 4.414(a)(3), 4.421(a)(3).) Defense counsel argued that the victim was not "any more vulnerable than any other victim of a 246 shooting" and that defendant thought he was defending himself.

In denying probation, the trial court found: "There was vulnerability on the part of the victim in the sense that the victim was completely without responsibility associated with setting the stage here. And society at large, I think, should be entitled to recognize that it can drive quietly and safely down the street in the early morning hours and not be assailed. [¶] In this circumstance, the victim was clearly a sitting duck." The court referred to the same factor as an aggravating factor that it balanced when it imposed the middle term.

The court's finding of particular vulnerability is supported by the facts. "Particularly, as used here, means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.) And here, the victim was a newspaper delivery person driving slowly in a residential neighborhood who was caught by surprise when fired upon by defendant. There was

no provocation, dispute, or warning. Under the circumstances, the victim was particularly vulnerable, i.e., he was unguarded, unprotected, and otherwise defenseless.

In so holding, we find that defendant's reliance on cases involving drunk driving and vehicular manslaughter is misplaced. Defendant observes, "The reasoning found in these cases -- which regards drunk driving victims as *inherently* vulnerable, and thus not *particularly* vulnerable -- applies here. Shooting at an occupied vehicle in violation of . . . section 246 is an inherently dangerous felony, posing great risk to any occupant, involving a high probability of death." We agree with the latter statement but not the former. Ordinarily, drivers expose themselves to the risk of some types of accidents, but that is not to say drivers expose themselves to the risk of being shot without warning, as occurred here. Further, many vehicle shootings arise under circumstances involving "road rage" or some other immediate confrontation between the criminal assailant and the victim. That was not the case here. Defendant exploited the victim's particularly vulnerable state when he fired at him from his concealed vantage point.

#### B. Planning

Second, we consider the issue of planning. The probation report included "planning, sophistication, or professionalism" as an aggravating factor and "criminal sophistication or professionalism" as a criteria affecting probation. (See Cal. Rules of Court, rules 4.414(a)(8), 4.421(a)(8).) The probation officer explained, "Defendant called his brother for assistance

and loaded his rifle once prior to the shooting and a second time immediately following the shooting." (Capitalization omitted.) Defense counsel noted that the probation officer had checked "the box that this was a sophisticated crime" and proceeded to explain that the crime was closely related to the attack by [Samuel] and occurred soon thereafter. Counsel emphasized it was "not a sophisticated crime." Counsel further claimed that the probation officer was wrong to assert that a significant amount of time had elapsed between the attack by Samuel and the shooting by defendant.

Whether defendant raised the issue of planning with sufficient specificity is a close question. But assuming arguendo that counsel's argument was sufficient, we find the trial court did not err in rendering its decision.

Preliminarily, the trial court noted that the exact timing was unclear but there were several intervening acts on defendant's part between Samuel attack and defendant's own criminal conduct. The court concluded that defendant had time for deliberation and reflection. In specifically discussing planning as a criteria affecting probation, the court explained: "There was certainly some level of planning associated with this event, because the defendant had the opportunity to decide whether to call the police or to take other action. [¶] And unfortunately, in this circumstance, instead of calling the police, he called the [Cavalry], which armed itself. And I can't surmise that that arming by the defendant's brother occurred by anything other than the words that were spoken over

the telephone setting up a circumstance obviously, that could have resulted in multiple shootings.” When the court further discussed the circumstances in the context of its decision to impose the middle term, it commented: “Certainly, while there was no sophistication or professionalism, and I don’t think that can be argued at all, there was planning because I’m satisfied that the time frame that has been set out reveals an opportunity for reflection and contemplation. At least, certainly enough to contact his brother to reinforce him.”

Preliminarily, defendant suggests that because planning is specifically described within the court rules as an aggravating factor but not as a criteria affecting probation, it should not have been considered in the latter context. (See Cal. Rules of Court, rules 4.414(a)(8), 4.421(a)(8).) Not so. The sentencing factors enumerated in the California Rules of Court are illustrative, not exclusive. (*People v. Charron* (1987) 193 Cal.App.3d 981, 994.) The trial court may consider “additional criteria reasonably related to the decision being made.” (Cal. Rules of Court, rule 4.408(a).)

Defendant further argues that after suffering the intrusion and attack by Samuel in his home, he had the right to summon assistance and to arm himself. Defendant cites The Home Protection Bill of Rights, codified as section 198.5, which sets forth a presumption supporting a finding of self-defense or defense of others in certain circumstances when a person uses deadly force *within his or her residence* against another person who has unlawfully and forcibly entered. Defendant argues, “The



only 'planning' that [defendant] engaged in was his plan to exercise his constitutional right of self-defense." Defendant characterizes "[h]is departure from lawful home defense" as "an unplanned mistake."

The trial court was justified in finding more than that based on the facts and the reasonable inferences that may be drawn therefrom. The prosecutor aptly commented that defendant "went from a point of obvious chaos and fear to a point of revenge and vigilantism." After Samuel fled, defendant did not contact police or merely attempt to defend his home against further intrusions. He summoned his brother, who attempted to come to his aid with a loaded shotgun. Defendant then proceeded to lie in wait, *outside the residence*, in anticipation of Samuel returning. Defendant's conduct itself is suspect, and it must be viewed in light of his subsequent behavior. There was no actual or apparent threat that was imminent at the time of the shooting, and defendant initially sought to conceal what he had done. The timing and attendant circumstances support a finding of planning for retaliation against Samuel.

#### C. Merciful Plea Bargain

Third, we consider the issue of the so-called "merciful" plea bargain. After argument by the parties, the court thanked the attorneys for their analyses and briefly commented on defendant and the unusual circumstances of this case. The trial court then made the following remarks, to which defendant takes issue: "Here, we have a circumstance in which I believe that -- to paraphrase the Bard, the quality of mercy was not strained,

in that the District Attorney made a rather significant adjustment in his approach to prosecuting this case by moving to dismiss easily the most volatile charge. Now, that obviously didn't occur in a vacuum. I have no question but that [defense counsel's] strong advocacy persuaded the District Attorney, in part, that it was the appropriate thing to do. [¶] But I also believe, as [the prosecutor] has suggested on more than one occasion and today as well, that the prosecuting agency placed into play the very remarkable circumstances in coming to that decision, which changed the complexion of this case dramatically insofar as legal outcomes are concerned. And it is important that that -- we'll all call it mercy, is not lost sight of because we're not at Square One. [¶] In the final analysis, we have moved considerably away from what he was charged with. And in hindsight, if my review of the case on a number of occasions with the present counsel and previous counsel, was not an unreasonable charge, by any stretch. [Sic.] I think that the end disposition is just and reasonable in the circumstances. So, I'm sure there may be those who would disagree, but I'm satisfied that it was the appropriate ultimate disposition and not an easy one to reach."

According to defendant, the trial court's comments reveal "that the decision to deny probation was based in part on inappropriate consideration of the favorable plea bargain." Defendant has not shown that his counsel raised this issue by making an objection, but he also alleges a violation of the plea bargain. In any case, the trial court's comments do not reveal

that it actually considered the plea bargain in making its decision about probation.

The court's comments may instead be reasonably construed as evidencing its approval of the plea bargain. (See generally § 1192.5.) Indeed, the substance of these comments was that the parties had reached a just disposition in the case. The court subsequently proceeded to discuss the criteria affecting probation after making the prefatory remark: "As far as the sentence is concerned, . . ." The court did not refer to the plea bargain itself as a criteria affecting its decision to deny probation.

D. Cruelty, Viciousness or Callousness

Fourth, we consider the aggravating factor that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness. (Cal. Rules of Court, rule 4.421(a)(1).)" The probation report included this as an aggravating factor. Defense counsel asserted that the elements of this aggravating factor are inherent in section 246 offenses and "this case clearly is not more aggravated than any other 246 case." The trial court concluded: "The offense that ultimately was chosen to dispose of this case is an offense which is completed, even without firing at an individual and even without the discharge of multiple rounds and even without firing and the vehicle is fleeing. It seems to me, in other words, that . . . the 4.421(a)(1) box is correctly checked."

Aggravating factors are factors that make a crime distinctively worse than the ordinary. (See *People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) Accordingly, facts that are more egregious than whatever is necessary to establish the offense may properly establish an aggravating factor or factors. (Cf. *People v. Miranda* (1987) 196 Cal.App.3d 1000, 1003.)

We agree with defendant that the "threat of great bodily harm" is necessarily present to a certain degree in cases involving the discharge of a firearm into an occupied motor vehicle. But the trial court did not err in holding that the threat created by defendant's acts exceeded an ordinary statutory violation. Most significantly, defendant fired multiple shots at the victim's slow-moving car. Further, the physical evidence was completely inconsistent with defendant's initial claim that he fired low and did not hit the car. In fact, defendant hit the windows, and the trajectory of one of the bullets included the area in which the driver's head and neck would ordinarily have been.

#### E. Effect of a Prison Sentence

Finally, defendant claims the trial court erred by failing to consider that he might be in danger if sentenced to prison because Samuel had threatened his life. As a criteria affecting probation, the probation report included: "The likely effect of imprisonment on the defendant and his or her dependents." (Cal. Rules of Court, rule 4.414(b)(5).) The probation officer explained: "Defendant's life has been threatened by [Samuel]

who is currently serving a lengthy prison sentence in the Department of Corrections as an outgrowth of the shooting of the defendant." (Capitalization omitted.) Defense counsel asked the court to take this factor into account and presented some information to the court about the threat.

The trial court stated, "What I'm going to go ahead and do, so the record is clear on it, is determine that the factor of likely [e]ffect of imprisonment on a defendant and/or his or her dependents, as called out in 4-414(b)(5), while obviously a factor to be considered, is not a factor that comes into play in circumstances in which, as the probation office has summarized in its report, there is a question whether the defendant's personal safety is at risk because of the report of threats or other similar reports associated with people who are in custody. [¶] In making that finding, I -- I am concluding that the issue of inmate safety is a penal institution issue, not a sentencing consideration. Drawing on the conclusion that were it otherwise, any number of circumstances could come into play to prevent a person from being sentenced to state prison, if he or she otherwise had earned it. And, of course, there is any amount of mischief that could be attempted, too, if that -- if that factor were understood to include threats from others. Not that I have any suspicion in this case that there is any mischief afoot. In fact, to the contrary. [¶] So, I will determine that that is not a circumstance as set forth within the evidence and in the probation office's report, that would be

considered by the court in connection with the question of sentencing choices."

The trial court entered a signed minute order advising the California Department of Corrections (CDC) that defendant had informed the probation department he "received 'letters from acquaintances' at the [CDC] stating that [Samuel], who is currently incarcerated within the [CDC], has 'vowed to exact revenge' upon the defendant, . . . ." The court noted that the CDC was "being notified of same so that any and all safety measures can be taken . . . ."

Defendant claims the trial court improperly recognized a blanket exclusion that would remove fear of prison as a sentencing factor, even in cases in which the defendant is a former police or correctional officer or an informant. Defendant cites to cases recognizing the important services to law enforcement performed by informants.

But the instant case does not present this type of situation, and the trial court's conclusion was necessarily limited to the facts here. We cannot fault the trial court's approach. The court reasonably concluded that under the particular circumstances, it would not take into account this factor in determining whether to impose a prison sentence or grant probation. Or, as the People suggest: "It was not a sufficient reason for [defendant] to escape otherwise appropriate punishment." In so holding, the court notified CDC of the threat and expressed confidence that CDC would take appropriate steps to protect defendant.

DISPOSITION

The judgment is affirmed.

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MORRISON, J.

We concur:

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DAVIS, Acting P.J.

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KOLKEY, J.